IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 377.

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

CITY OF MOBILE,
Appellee.

BRIEF

In Opposition to Motion to Dismiss or Affirm on Behalf of Appellant.

I.

We redirect attention to the fact that though the City has been given another opportunity to set forth the economic, political or sociological justification of the license sought to be imposed here, not one word has been written to indicate

(1) that Dunbar Stanley was not the sole object of this confiscatory, catch-all, privilege license, and

(2) that this license was not adopted to exclude Dunbar Stanley from doing business in Mobile.

Instead, the sole response here is that Dunbar Stanley's constitutional rights must be sacrificed on the procedural requirements as to "standing". In the absence of any explanation of this license, the inference is overpowering, that it was conceived and born in iniquitous discrimination. And this is positively alleged in the Bill.

The crucial question here is, can a city use its licensing power to exclude out-of-state competition? This is what has been achieved in this case. The Federal Constitution was adopted to prevent this.

II.

It was alleged in the Original Bill of Complaint in this case:

> "4. On, to-wit, the 12th day of October, 1965, the License Department of Defendant issued a citation to J. C. Penney Company for the operations of plaintiff in the City of Mobile on the premises of J. C. Penney Company under such Ordinance, a copy of the citation is attached hereto marked Exhibit B, and by reference made a part hereof.
>
> 5. The remedy provided by the hereinabove described Amended Section of the License Code, and Sections 19, 20 and 25, thereof, make operation without a license a crime and upon conviction therefor, provide punishment by fine up to $100.00 and also imprisonment up to six months.
>
> 6. This is the remedy now used by defendant to collect licenses, including the license issued under the Amended Photographer's License and defendant has threatened that unless this citation is paid, this remedy will be used in this case, and one or more agents, servants or employees of plaintiff will be arrested and prosecuted to enforce the citation attached hereto as an exhibit.

7. The amendment of the License Code of this City adopted on August 31, 1965, relating to photographers, hereinabove set out, was made for the purpose of expanding said Section to apply specifically to the operations of plaintiff in this City, and to no one else, by adding subsection d thereto.

8. This Amended Section has been applied, only to the operations of plaintiff in the City of Mobile, and to no one else.

9. This plaintiff has been and is now engaged exclusively in interstate commerce for which it is not now liable to defendant for the license for which the citation was issued or for any other license, * * *.

* * * * * * *

E. (9) J. C. Penney Company has not now nor at any time involved in this suit, any photographic equipment or photographers in the City of Mobile or the State of Alabama. It does not offer any photographic service for compensation or otherwise in the City of Mobile, except that of plaintiff."

Insofar as we can find, this is the only case in Alabama where the Court has not held that on demurrer the allegations of the Bill of Complaint must be taken as true.

See **Winston v. Winston**, 276 Ala. 303, 306, 161 So. 2d 588 (1964) cited on page 12 in the Jurisdictional Statement.

Instead, the Alabama Court held that on these allegations J. C. Penney Company was liable for this license, and not being joined in this proceeding [which included an application for an injunction which was abandoned when the City Commission agreed with Dunbar Stanley to withhold prosecutions under this license upon Dunbar Stanley's promise to pay Dunbar Stanley's money for this license in the event the courts ultimately held this license con-

stitutionally valid]. Dunbar Stanley had no standing to raise the constitutionality of the license.

Thereupon, the Bill of Complaint was amended to allege:

> "14. The privilege license sought to be imposed in this case applies to:
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> > 'photographers, or persons, firms or corporations taking photographs or offering photography service for compensation * * *.'
>
> J. C. Penney Company is not a 'photographer' nor is it a corporation 'taking photographs' nor does it offer 'photography service for compensation.' Therefore, any citation issued to J. C. Penney Company under the photographer's license is a mistake and an error for J. C. Penney Company has done no act nor has any act been done by, for, or on its behalf which would make said Ordinance applicable to J. C. Penney Company.
>
> (b) This Plaintiff, engaged in interstate commerce as set out above, has offered photography service for compensation at Springdale Plaza on the premises of J. C. Penney Company. Therefore, the citation for the photographer's license attached to the Bill of Complaint, if it should have been issued, should have been issued to this Plaintiff, and not to J. C. Penney Company.
>
> (c) Under the Agreement between Plaintiff and J. C. Penney Company, set out above, any licenses required for the offering of photography service must be obtained by Plaintiff and not by J. C. Penney Company, and any license required of J. C. Penney Company must be paid for by Plaintiff, and Plaintiff must indemnify J. C. Penney Company for any loss or liability for any such license. Therefore, Plaintiff is the real party in interest in any litigation con-

cerning the photographer's license for the photography services described herein.

(d) Prior to the amendment of the photographer's license of the City of Mobile by adding paragraph (d) thereto, the City of Mobile demanded that Plaintiff obtain a license as a Transient Photographer during the year 1963, and as a result thereof, Plaintiff obtained such license. It became apparent that Plaintiff was not a Transient Photographer, and therefore, was not liable for that license. Whereupon, a request for refund for Plaintiff was made, and it was recommended that J. C. Penney Company obtain a license for a studio photographer, all as set out in a letter to the City, a copy of which is attached hereto marked Exhibit D, and by reference made a part hereof.

The City accepted this offer and refunded the amount of the photographer's license to Plaintiff and accepted in place thereof the annual license on J. C. Penney Company as a matter of compromise and settlement, all as shown in a letter from the Mayor, a copy of which is attached hereto marked Exhibit E, and by reference made a part hereof.

Thereafter, the license was amended to add paragraph (d) for the express purpose of including Plaintiff's activities within the coverage of the license.

Notwithstanding the fact that J. C. Penney Company has now and since 1963 has continuously obtained an annual photographer's license under paragraph (a) of the license schedule, the City License Officer served the citation attached as an Exhibit hereto upon J. C. Penney Company, though the City License Officer well knew of Plaintiff and Plaintiff's activities, and knew that paragraph (d) was inserted in the Schedule to apply to Plaintiff's activities and not to J. C. Penney Company.

> The issuance of the citation to J. C. Penney Company rather than to Plaintiff was done for the purpose of preventing Plaintiff from gaining access to this Court to test the validity of paragraph (d) of the License Schedule since the paragraph did not and could not apply to J. C. Penney Company, but Plaintiff was excluded from the citation to prevent Plaintiff from testing the paragraph in this Court."

Now, Supernumerary Circuit Judge Simmons holds as a matter of law, that upon these allegations Penney does owe this license and Dunbar-Stanley's rights guaranteed under the Federal Constitution cannot be reviewed by this Court in this case.

This Court has responded to this sort of argument concerning a decision by the Supreme Court of Alabama calculated to forestall review of its action in ignoring claims for protection of constitutional rights against flagrant violations thereof in **N. A. A. C. P. v. Alabama,** 357 U. S. 449, 457 (1958), cited on page 16 of Jurisdictional Statement:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

We have tested the validity of city licenses in actions for declaratory judgment with the City of Mobile.

> **Mobile Battle House v. City of Mobile,** 262 Ala. 270, 78 So. 2d 642 (1955).

And a mere demand for a license has been held sufficient to create a justiciable controversy.

> **Brown v. Southern Cigarette Co.,** 269 Ala. 539, 114 So. 2d 387 (1959).

A fortiori, a threat to jail employees as alleged in the Bill, should satisfy the requirement for justiciable controversy.

Hence, our reliance on declaratory judgment to vindicate federal constitutional rights in this state court was justified. To permit the State Court to thwart this effort by these new procedural requirements in this case will put constitutional rights at the mercy of bizarre state court procedural rules. Furthermore, Justice Jackson's observation in **Shapiro v. U. S.**, 335 U. S. 1, 70 (1948) cannot be ignored, where he commented on

> "The tendency of * * * a principle once approved, to expand itself in practice 'to the limits of its logic'."

It is to review this action that this appeal has been taken and these questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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